No. 91 - 965

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHRIST COLLEGE, INC., *et al.*,
Petitioners,

v.

BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA, *et al.*,
Respondents.

Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF

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The parties' vastly differing interpretations of Employment Division v. Smith, 110 S. Ct. 1595 (1990), reveal the need to grant certiorari to clarify the standards that apply to free exercise cases. The parties' vastly differing interpretations of the facts indicate that the trial court erred in taking this important case away from the jury.

I. PETITIONERS DID PROVE THAT THEIR "HYBRID" RIGHTS WERE BURDENED AND DID NOT NEED TO PROVE RELIGIOUS ANIMUS OR DISCRIMINATION.

Petitioners' rights manifestly involve the type of free exercise and parental right hybrid situation recognized in Smith through the Pierce/Yoder line of cases upon which petitioners consistently have relied. Smith, 110 S. Ct. at 1601 (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Wisconsin v. Yoder,

406 U.S. 205 (1972)). Petitioners' rights also manifestly involve the free exercise and free speech hybrid situations involving religious instruction, worship and advocacy of ideas, as recognized in Smith, 110 S. Ct. at 1601-02. Respondents failed to address this free speech aspect.[1]

Respondents and the Court of Appeals incorrectly assumed that the first step in free exercise analysis is to determine the existence of a burden on religious rights. County Opp. at 39; Town Opp. at 36; App. at 8a. It is impossible for a court to determine whether a religious liberty has been burdened until the court has ascertained the nature of the right at issue and the scope of the associated

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[1] County respondents "will not respond" to petitioners' argument on this point because it was not "fully assert[ed]" in the trial court or on appeal. County Opp. at 39 n.15 (emphasis added). Town respondents make no mention of the argument.

religious conduct. In a tort case, no reasonable court would undertake to determine whether a breach of duty had occurred unless it had first established that a duty of care existed, and whether it was a duty of ordinary care, a heightened duty such as a fiduciary duty, or only a duty to refrain from gross recklessness. Similarly, determining whether the constitutional right at stake in this case is a "simple" free exercise right, or one that also embraces the right of parents to direct the religious education of their children, or the communication of religious beliefs is essential to evaluate the conduct at issue, and to determine whether that conduct is protected and has been burdened.

There is a lack of candor in respondents' failure to recognize that petitioners consistently have predicated

their hybrid free exercise claims on an alleged burden of religious conduct compelled by religious belief.[2] If the rights at stake are, as alleged, hybrid ones involving the implementation of intertwined religious beliefs and parental responsibilities, certainly a reasonable jury could have concluded that a significant burden on those rights arose from shutting down Fairfax Christian School, the only available forum to petitioners for exercising such rights. See, e.g., J.A. at 1811. Certainly a reasonable jury could have concluded that a significant burden on those rights arose from subjecting that unique forum and some of the petitioners to unprecedented

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[2] Respondents go so far as to emphasize that the complaint did not have a "hybrid" count. County Opp. at 39. They fail to note that the complaint was filed before Smith created this category and, immediately thereafter, petitioners began making hybrid rights arguments within the broad scope of the complaint. See, e.g., J.A. at 1344-1368 (pretrial brief).

enforcement activities and public pronouncements that hindered operation of the religious school and blackened the reputation of those associated with it.

If, as also alleged, the right at stake also includes implementation of religious free speech, certainly a reasonable jury could have concluded that the actions of the respondents were equivalent to the burdens caused by breaking up a public meeting and imposing prior restraints on such speech.

Concluding that such burdens exist is only part of the analysis, however. Petitioners and respondents disagree on whether strict scrutiny always must be applied in hybrid rights cases to determine if burdens on the constitutionally-protected conduct were justified by a sufficiently important governmental interest implemented by narrowly tailored actions. See County

Opp. at 47. This important point needs to be clarified by this Court. We submit that Yoder, on which petitioners principally rely, may not be read any other way but to require strict scrutiny. See 406 U.S. at 215, 233. That hallowed precedent should be honored or overruled; it should not be ignored as it has been by the courts below and Town respondents.[3] In light of Smith's approval of Yoder, it would seem difficult to justify anything but the highest levels of judicial scrutiny when essential constitutional protections in addition to free exercise are burdened.[4]

As Yoder and Smith demonstrate, proving "animus" or an intent to

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[3] Despite a clear record to the contrary, Town respondents claim that petitioners rely on Sherbert v. Verner, 374 U.S. 398 (1963). Town Opp. at 16; compare Pet. at 13 and 13 n.8.

[4] The fact that State v. DeLaBruere, 154 Vt. 237, 577 A.2d 254, 263 n.10 (1990), holds otherwise demonstrates the need for clarification.

discriminate is not necessary to establish a hybrid free exercise claim. The County respondents attempt to import these elements into the free exercise analysis by asserting that petitioners' free exercise claim is "in essence" "more an equal protection challenge." County Opp. at 51. That is neither true nor helpful, nor have petitioners "reversed" their position on this, as respondents contend.[5]

That is not to say that the jury should not have been allowed to consider the burdens stemming from the failures to accommodate and selective enforcements alleged in this case. County respondents admit their refusal to take petitioners' religious needs into account with respect to the challenged actions. J.A. at 1425-

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[5] County Opp. at 52-53; App. at 16a. Intent is an element of an equal protection claim and due process claim, both of which were argued in the courts below. Petitioners never argued that it was a necessary element of free exercise claims.

27. Under Smith, this amounts to a prima facie burden on free exercise, because respondents easily could have given petitioners individualized exemptions for religious hardship. 110 S. Ct. at 1603.[6] Indeed, the County respondents appear to make a fatal concession in this and other regards. They admit that they accommodated Fairfax Christian School by knowingly allowing the mission to operate in violation of the zoning ordinance prior to the controversies at issue here. County Opp. at 11, see also 32 (characterizing this accommodation as favorable "disparate treatment").

Moreover, there was an abundance of evidence from which a jury could have deduced that selective enforcement of the

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[6] Here, the Smith majority endorses the following statement from Bowen v. Roy, 476 U.S. 693 (1986): "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."

law imposed on petitioners greater burdens than the norm, the direct opposite of the less restrictive accommodations required by Yoder. This evidence includes the following facts:

- Respondents ordered Fairfax Christian School evacuated when other schools having similar or greater levels of violations were not evacuated, J.A. at 1903-10;

- It was the "normal procedure" in Vienna to allow 30 days for correction of any code "violations," but after assurances to the contrary, the "usual procedure" was not followed with Fairfax Christian School, J.A. at 1669-76;

- County respondents admittedly brought an unprecedented surprise injunction suit against Fairfax Christian School after receiving explicit assurances that this religious school would not open until all building, fire and safety requirements were satisfied, County Opp. at 59;

- Town respondents brought an unprecedented injunction suit based on "violations" that had sprung into existence solely as a result of loss of grandfathering, when uncon-

tradicted expert testimony established that there was no imminent danger, and the school's attorney offered to suspend classes, post fire watches, or take other remedial measures pending completion of the corrections that were initiated immediately after notice of them was given, J.A. at 1566, 1678-79.

II. RESPONDENTS MATERIALLY MISSTATE THE EVIDENCE.

Respondents' arguments reflect misstatements of the material facts and a misunderstanding of directed verdict standards.[7] The boldness of these misstatements cannot be understated, although space limitations allow only for examples.

The County respondents assert that

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[7] On appellate review of a directed verdict the "Court of Appeals [is], of course, bound to view the evidence in the light most favorable to [the non-moving party] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 696 (1962). It is the jury, not the trial or appellate courts, that "weighs the contradictory evidence and inferences" and draws the "ultimate conclusion as to the facts." Id. at 701.

"The Drydens hold no religious belief that requires their children to be educated at FCS." County Opp. at 4. This is a misleading characterization of extensive testimony on the Dryden petitioners' religious convictions, which include the conviction that their children's education in the classroom should "teach them in a Godly way subjects being presented from a Biblical perspective and God being at the center of every aspect of the education." J.A. at 1810. Respondents lack candor in failing to call this Court's attention to the clearly articulated belief of Mr. Dryden, who resided with his family in Fairfax County and worked there, that Fairfax Christian School was the only school that would satisfy his religious requirements in that County or the surrounding area. J.A. at 1811.

Despite respondents' admissions and the trial court's findings of petitioners' sincerely-held religious beliefs, respondents go out of their way to slur petitioners. For example, they alleged that petitioners' actions were "motivated solely by business reasons" and characterized Rev. Robert Thoburn's "wealth" as growing to over $10 million in the 1980's. Town Opp. at 30; County Opp. at 4. The alleged business motivation is contradicted by respondents' own admissions that the Thoburns were engaged in a religious mission, J.A. at 1732, 1734, and the uncontested testimony of Rev. Thoburn. J.A. at 1517-1518. The multimillion dollar "wealth" characterization related to the now much-diminished value of land accumulated by Rev. Thoburn primarily to build Christian schools. J.A. at 1514-15. Robert Thoburn lost millions of dollars operating Fairfax

Christian School, J.A. at 1584, and the principal of the school, petitioner Lloyd Thoburn, testified unequivocally and passionately that money could not possibly be the motivation for the Thoburn family's religious conduct. J.A. at 1761.

In another statement that lacks candor, Town respondents averred that, "The Thoburns presented no evidence at trial to show that County attorneys worked with Vienna attorneys on the injunction case." Town Opp. at 12. "No evidence," that is, except for the cross-examination testimony of the highest ranking executive of the County, J. Hamilton Lambert, who expressly "admitted" that "our [County] attorneys worked with theirs [Town attorneys]" on the injunction case. J.A. at 1727-28.

Respondents also engage in straw man arguments. For example, the County respondents argue that the "evidence in

the case at bar does not reveal any religious belief which required the Thoburns to take any action which was inconsistent with any of the zoning or building regulations applied by County officials to FCS." County Opp. at 56. Of course the evidence does not reveal such a belief. Petitioners never made such a contention and, prior to the instant controversy, the County accommodated petitioners by using less restrictive means to enforce its regulations. County Opp. at 11, 32.

What petitioners did contend was that they have a sincere religious belief requiring them to operate a religious mission school and to have their children educated there. They proved this contention to the satisfaction of the trial court, which made a specific finding on their religious dedication in this regard. App. at 27a.

III. PETITIONERS DID RAISE AN "AS APPLIED" CHALLENGE, AND THE COURTS BELOW DID REFUSE TO TREAT IT AS SUCH.

Contrary to respondents' astounding arguments, it is abundantly clear that neither court below analyzed this case as an "as applied" challenge to the actions taken by respondents. Compare respondents' contentions, County Opp. at 50-53; Town Opp. at 31-35, with what the courts actually said, App. at 7a-9a and 28a-29a.

For one of many examples, the court of appeals, in its discussion of free exercise, clearly held that petitioners "have not proved that the zoning laws or fire codes burden their exercise of religion." App. at 8a (emphasis added).

IV. TOWN RESPONDENTS VIRTUALLY CONCEDE AN ESTABLISHMENT CLAUSE VIOLATION.

Town respondents surprisingly assert that, "This Court's interpretation of the Establishment Clause is fully set forth in Illinois ex rel. McCollum v. Board of

Education, 333 U.S. 203 (1951)," (emphasis added). Town Opp. at 39. Relegated to "see also" status was Lemon v. Kurtzman, 403 U.S. 602 (1971), at all relevant times the leading precedent in this area of the law, at least as of the time of this Reply Brief. Town Opp. at 40.

Lemon, of course, establishes the much-discussed three-prong test. To pass muster under the Establishment Clause, the challenged regulation must satisfy all of the following tests: it must have a secular legislative purpose; it must have a primary effect that neither advances nor inhibits religion; and it must not foster excessive governmental entanglement with religion. 403 U.S. at 612-13.

Petitioners specifically pled in their complaint that the Town respondents "became improperly entangled in matters that must be reserved to religious institutions" when they prohibited

religious and other uses by Fairfax Christian School of the Vienna Assembly of God Church sanctuary. J.A. at 1210. Such entanglement is evident on the face of the Town's prohibition. Absent some truly overriding governmental concern, the Town respondents have no legitimate warrant for deciding whether schoolchildren may pray and have religious lessons -- or even math lessons -- in a church sanctuary.

The Town respondents argue that there is no Establishment Clause violation because "the Thoburns presented no evidence at trial" that the permit restrictions "addressed anything but secular concerns," and because the issuance of the permit was a "secular act." Town Opp. at 40-42. If one were to view the evidence in the light most favorable to the Town regulators, their sanctuary prohibition must be considered unconstitutional because it has, at best,

no purpose, whatsoever.[8] Clearly, the primary effect of this restriction is to inhibit the exercise of religion through the meaningless limitation of options for religious school teaching locations.

The Town respondents do not attempt to show lack of entanglement or offer any justifiable basis for their unprecedented prohibitions. Instead, they argue that this prohibition "did not affect the curriculum of the FCS or otherwise interfere with the Thoburns' religious beliefs or practices." Town Opp. at 41. That is both wrong and irrelevant. The prohibition directly interfered with religious practices by prohibiting prayer and religious classes that previously had been conducted before the Cross in this sacred location. J.A. at 1574-1575, 1755.

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[8] No reason for this extraordinary prohibition was given at the time it was issued, and none was provided at trial.

CONCLUSION

There is an established, critical need to clarify the standards that apply in deciding a case in which free exercise and other fundamental rights are inextricably intertwined. This case provides the Court with an opportunity to satisfy that important need.

Respectfully submitted,

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